NO. 196

IN THE

Supreme Court of the United States

No.....

THE NEW YORK CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

WILBUR H. MOHNEY,

Respondent.

MEMORANDUM OF RESPONDENT OPPOSING MOTION AND PETITION FOR WRIT OF CERTIORARI.

ALBERT H. MILLER,
A. JAY MILLER,
Attorneys for Respondent.

The Toledo Legal Printing Co.
436 Huron Street,
Toledo, Ohio.

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I. FACTS.

This action has been before the courts for some time. How-be-it the facts are simple and the record quite brief.

Wilbur H. Mohney was a fireman on the New York Central. His run was between Air Line Junction, the division point at Toledo, Ohio, and Collinwood, the division point at Cleveland, Ohio. His work required that he should report as directed by the railroad at one division point or the other, for duty.

Shortly after he hired out to petitioner, the company issued to him an annual card pass entitling him to transportation between these two division points. Thereafter, in successive years, similar passes were issued to

him, on the last of which he was riding when injured. These passes and this pass were all of them valid between the said division points only, at either of which division points he might be called upon at any time by the railroad to report for work. Both of these division points were within the State of Ohio, on petitioner's line of railroad extending between said division points wholly and only within the State of Ohio.

This pass in question contained a clause on the back purporting to exempt the railroad from liability for injuries received by one riding on such pass.

Mohney rode on that last pass on a night train out of Toledo (Air Line Junction) quite a while ago. *The Company says* he was bound for Pittsburg. *Mohney says* he was bound for Youngstown, Ohio, and at that point was going to call up his brother-in-law in Pennsylvania and find out where and when his mother was to be buried. The mother had died a day or so before. Mohney had received word of her death, *but no word as to where and when she was to be buried.*

Between Toledo, Ohio, (Air Line Junction) and Cleveland, Ohio, (Collinwood), on the New York Central, there is a little town of Amherst, Ohio, where one of the block signals of the railroad is located. These block signals are scattered all along the line of the New York Central, and control, or are intended to control, the movement of trains.

Mohney was on the first section of train number eighty-six out of Toledo, Ohio. Another train followed a few miles back, the second section of train number eighty-six.

Mohney's train was stopped by a block signal in Amherst. Thereupon, away in the rear of this train, a mile or so back on that line of railroad, the block sig-

nals displayed warning and stop signs. But these signals meant nothing to the engineer of the second section racing up from behind. He disregarded the caution signals, the danger signals, the stop signals, plunged on with his train, crashing into the motionless first section injuring Mohney and many others.

The wreck caused quite a little commotion in railroad circles for a time, inasmuch as it was suggested by someone that perhaps the block signals had not worked properly. But this anxiety was set at rest by the investigations of the State and Interstate Commerce Commissions, and by the statement of the General Manager of The New York Central Railroad Company, which statement, in agreement with the findings of said commissions, appears in the record in this case as the evidence of the cause of the wreck. This evidence appears in the stipulation of the parties hereto, made at the initial trial of this case. The material portion of said statement of the General Manager as heretofore stipulated at the trial of this cause below, is as follows:

> "That the wreck occurring on the defendant's line near Amherst, Ohio, in which the plaintiff received some injuries, was due to the fact that the engine-man of the second section of defendant's train number eighty-six disregarded the caution signal about eight thousand feet and the stop signal about three thousand feet in the rear of the first section of defendant's train number eighty-six."

The petition alleges these facts and says that

> "* * * the defendant was grossly negligent and careless at said time in that when the train on which he was a passenger had stopped near Amherst, Ohio, the engineer of the second section was grossly negligent and careless in that he did not look for, see or observe the danger signals, which

were displayed along the line far in the rear of the train on which plaintiff was riding * * *"

"* * * that notwithstanding the fact that said danger signals were displayed, the said engineer of said second section, with gross carelessness, ran his train along the said track approaching plaintiff's train, at a high speed, notwithstanding said danger signals and contrary to the known and established rules of the defendant * * *"

"* * * the said defendant, so acting thru its engineer and servant, was grossly negligent and careless in the operation of the said second section, which was following the first section on which plaintiff was riding * * *"

"* * * that the direct and proximate cause of the said accident and of his injuries was the gross negligence and carelessness of the defendant * * *"

II. ARGUMENT.

There are three important features of this case, all of which have been passed upon the courts below, and as follows:

a. Whether or not the railroad was guilty of wanton and willful negligence in causing the wreck at Amherst. The highest court below held that it was guilty of willful and wanton negligence.

b. Whether the regular annual employee pass on which Mohney was riding was issued to him for a consideration. The highest court below held that it was based upon a consideration.

c. Whether Mohney was on an interstate or intrastate journey at the time of receiving his injuries. The highest court below held that he was on an ~~intrastate~~ interstate journey.

We will take up these three features and discuss them briefly in the above order.

(a) Wanton and Willful Negligence.

The conclusion of Mohney in his petition as to whether the company was guilty of gross negligence or of any other kind of negligence is immaterial. He alleges the facts and it is for the court to determine what those facts amount to. The highest court below in which this case has been heard, held that the acts of the railroad constituted wanton and willful negligence. Now the railroad complains and says that Mohney, by his petition, did not count on wanton and willful negligence. True, Mohney did not state his own opinion as to what kind of negligence it was. What he did was to draw and file his petition conformable with Ohio law, setting out the ultimate and operative facts. Had he plead his conclusions thereon, the same would have been improper. It was for the court to determine the degree of negligence, and the court did determine it, holding that the railroad was guilty of wanton and willful negligence.

As suggested in its brief filed in support of its motion for petition and writ of *certiorari,* the railroad plead in its answer the fact that a fog clouded these signals, but it introduced no testimony in support of that fact and we can safely assume now that no such testimony was available. At least it would not have availed much in face of the testimony of the general manager who said that the engineer of the second section *disregarded* the signals. And on the other hand it is immaterial whether this engineer disregarded these signals because they were clouded by fog, or because he didn't look for them, or because he forgot what he was doing, or for some other reason. Those signals were there to save people's lives. They were there and are there to be observed. Engineers can and must regard them.

Mohney was on that train entitled to some rights, some degree of care, whether the highest degree of care or only slight care. He got no care at all.

The defendant signaled its trains by block signals—go ahead signals, caution signals, and danger or stop signals. The engineer of the second section of train number eighty-six, following Mohney's train, ran by caution signals, ran by the danger signal, disregarded every known rule of his company, ploughing his engine through Mohney's train. Wanton negligence. Not wanton negligence? Who then *is* guilty of wanton negligence?

(b) Pass Based on Consideration.

In addition to the foregoing specific finding as to wanton and willful negligence, the courts below uniformly held that this Ohio pass issued to Mohney under Ohio law was issued to him in consideration of his employment and acceptance of employment. It was not a free pass, or issued under any provision of any Federal statute. It was good between points and on a line running wholly and only within the State of Ohio. It was issued under Ohio law.

Whether Ohio statutes forbid or do not forbid the issuance of transportation based upon such a consideration is immaterial. Railroads are required to equip with automatic couplers, yet the books are full of cases involving the violation of that law. Railroads are required to screen their engines so as to prevent the emission of sparks, yet fires occur by reason of the violation of that law.

The company took on particular liking to Mohney when it hired him, which influenced it to issue transportation to him. It didn't care to make him a present. It was not his looks or anything else that moved the railroad to issue to him that pass, excepting his acceptance of employment and employment.

(c) Interstate or Intrastate Journey.

The railroad at former trials attempted to make a showing that Mohney was ultimately bound for Pittsburgh to attend his mother's funeral. It bases this contention upon an inadvertant response of Mohney to the railroad's counsel, in answer to a question as to where at that time he was going. To that particular question Mohney answered, "Pittsburgh". We say this was an inadvertent response of Mohney. Indeed it is quite so. Mohney was not going to Pittsburgh. His mother had not lived there, she did not die there, she was not to be buried there, nor did Mohney know anybody there.

He did not know the date of the funeral, nor where his mother was to be buried. Mohney's *actual and positive intention* as shown in the record was to go to Youngstown, Ohio, and there to call up his brother-in-law in Pennsylvania on long distance to get the facts about his mother's funeral, and to visit with some of his friends at Youngstown for a few hours. Besides he intended to eventually call at a different depot at Youngstown, Ohio, and see if a pass had been left there for him entitling him to ride from Youngstown, Ohio, into Pennsylvania. This latter pass Mohney never received. It never became a contract between him and any railroad. By its provisions it would and did provide that it would not be valid until he had received it and signed his name on the back thereof under the exemption clause. He never received it and of course, never signed his name to it.

Whether or not Mohney would have gone from Youngstown, Ohio, to Pittsburgh, Pennsylvania, and from there on to that little town where his mother had died, would have depended largely, yes, altogether, upon the information received by him from his brother-in-law on long distance. This will never be known for Mohney

never got to Youngstown. But for all that, had he reached Youngstown, he might have learned from his brother-in-law on long distance that his mother was to be buried in the town where she died, in that other little town where her people had lived, or that her body had been shipped on to Toledo for burial from Mohney's home. Mohney's *present intention* was to go to Youngstown, Ohio. His *future purpose* was to be determined by the information which he expected to receive while at Youngstown, Ohio.

III. CONCLUSION.

But all this is of no great moment when we recall the circumstances of this accident and the findings of the lower courts in relation thereto, namely that the Ohio pass on which Mohney was riding was issued to him for a consideration and that in injuring him, the railroad was guilty of willful and wanton negligence. The Thompson case (*Railway vs. Thompson*, 234 U. S., 536) does not militate against the holdings of the lower courts in the case at bar. There is no case reported anywhere in the books which does militate against it.

In the Mohney case, Mohney himself was riding on transportation intrastate, from a point in Ohio to another point in Ohio.

In the Thompson case, Thompson is the employee, but it was his *wife* who was riding on the transportation, a pass, reading from a point in Georgia, to a point in South Carolina, in other words interstate.

The Mohney pass was intrastate, good between points wholly within Ohio, Air Line Junction and Collinwood, and was not and could not have been issued under the provisions of Federal law. It was issued under the laws of the State of Ohio.

The Thompson pass read from a point in Georgia, to a point in South Carolina, and was

therefore interstate, issued therefore under the Hepburn Act, or else issued in spite of the Hepburn Act.

The Mohney pass was an annual card ticket entitling Mohney to transportation as an *employee*, himself.

The Thompson pass was a trip pass.

Mohney is the one who used his annual card ticket.

Thompson's wife, to whom Thompson's company did not bear the relation of employer, was the one who used the pass in the Thompson case.

In the Mohney case, Mohney was injured through the wanton and willful negligence of the railroad.

In the Thompson case, the railroad was not guilty of wanton and willful negligence.

Had Mohney taken that Ohio pass and tried to use it between points other than between Toledo, Ohio, and Cleveland, Ohio, he would have found out mighty quick that that pass was good only between those two points. Nor could he have enlarged the scope of the pass by writing in the name of some destination different from that which was originally imprinted thereon. Neither could Mohney by any other act so change that Ohio pass as to alter its character. It was instrastate the day it was issued, and intrastate it remained.

At the time of the issuance of the employee's pass as well as at the time of the wreck, both The New York Central and Mohney were residents of the State of Ohio, the pass was issued in Ohio, it was good only between points within Ohio, Mohney used it in Ohio, he was hurt in Ohio on an Ohio railroad, and suit was brought in Ohio in Ohio courts, under the general law of negligence of Ohio.

We suggest therefore the following:—

1. The law of the forum, namely the law of Ohio, controls this case and that the exempting clause on the back of the Mohney pass is invalid.

2. That the holding of the Ohio Court invalidating the exempting clause on the back of the Mohney pass is in conformity with the holdings of the courts of the United States, and that in no event may such a clause exempt the railroad from liability on a pass issued for a consideration and for negligence, wanton and willful.

Under the facts of this case, there is and has been no error intervening prejudicial to the rights of the petitioner in this action.

All of which is

Respectfully submitted,

ALBERT H. MILLER,
A. JAY MILLER,
Attorneys for Respondent.